This unanimous proscription of the practice of voluntary abortion is "significant of a widespread belief" which reasonably may be held that there is a compelling interest sufficient to justify legislation restrictive or prohibitory of the practice. [*Cf., Muller v. Oregon*, 208 U.S. 412, 419-421.] The legislative record is strong evidence, too, that it may be and is reasonably believed that it is desirable to permit the practice when it is necessary to save the mother's life; and that to say so in that direct and concise way is sufficient to warn intelligent men that when they essay to perform an abortion with any other purpose in mind than preservation of life, they are entering forbidden territory.

Legislation may be constitutionally based on beliefs so widely held. [*Jacobson v. Massachusetts*, 197 U.S. 11, 30-35; *Muller v. Oregon, supra*, 208 U.S. at 420-421. And see, *Cleveland v. United States*, 329 U.S. 14, 18-19.] To overthrow that legislation on due process grounds is obviously an action that raises constitutional questions of the gravest kind. Further, by that overthrow, California has created a conflict of decision among the States on this very question, as is shown at

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plicitly or implicitly, they incorporate or adumbrate the standard of necessity or purpose to save the mother's life. In a few of these the physician is given an independent alternative of proceeding after consulting one or several other physicians, or receiving from them a certificate that an abortion is necessary to save the mother's life or to prevent serious injury to her physical or mental health. It is at least strongly arguable that these thirteen statutes, too, are adversely affected by the rationale and holding of the instant case.

Thus, it is evident that the statutory policy of all but four States has been put in jeopardy by the decision in this case. Even the four, in which abortion is prohibited without exception, are in jeopardy, for it was strongly argued below and at least intimated in the State court's opinion that the Due Process Clause of the Fourteenth Amendment prevented any such circumscription of the mother's power to do as she will with her body.

pages 7-14 of the petition here. It is, we suggest, important that the Constitution not mean something different in California from what it does in New Jersey or in any other State that prefers its legislative to California's judicial policy; and that other States in which the question has not yet been decided should have an authoritative guide to a correct result.[4]

II.
The Question Whether the California Statute Is Void for Vagueness Is a Substantial One.

Definitive discussion of the merits of the question whether the California statute is void for vagueness should, no doubt, await action upon the petition for certiorari. At the moment the issue is not whether the State court was right, but whether it decided a question of such substantiality and importance as to deserve the interposition of this Court. Accordingly, we touch the merits lightly and only to show that the question upon which the California court has spoken is a substantial one.

First: The key to the decision below is the State court's evident belief that the statute requires the doc-

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[4]The likelihood that the question will arise elsewhere is not remote. It is common knowledge that there are well-organized groups in this country whose purpose it is to make voluntary abortion lawful. The probability cannot be discounted that there will be a concerted effort throughout the country to accomplish that result by judicial action adopting the California rationale; an effort that no doubt will be carried on with the assistance of organizations such as the American Civil Liberties Union, which was most active in the instant cause in behalf of the defendant doctor. Indeed, immediately after the California decision a suit challenging the constitutionality of New York's abortion laws "was filed jointly by the ACLU, the New York CLU, the James Madison Constitutional Law Institute and the Association for the Study of Abortion." [*Civil Liberties* (Publication of the American Civil Liberties Union), December, 1969, p. 6.] There is every reason to suppose the effort will not stop with New York.

tor, at the risk of his liberty, to speculate on what is meant by the phrase "necessary to preserve her life." [*Petition,* Appendix "A", pp. 5-8, 18-19.] The doctor, the court said, "acts at his peril if he determines that the woman is entitled to an abortion. He is subject to prosecution for a felony and to deprivation of his right to practice medicine . . . if his decision is wrong . . ." [*Petition,* Appendix "A", p. 23.] But, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matters of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death . . ." [*Nash v. United States,* 229 U.S. 373, 377. See, also the cases cited, note 5, *infra.*] It is, therefore, no constitutional objection to the statute that the operating physician must estimate rightly the degree of necessity involved in the case. He is clearly warned by the statute that when he performs an abortion he is entering an area in which he acts at his peril. That is a peril inherent in any statute that prescribes a standard of conduct in terms that necessitate the exercise of some critical or evaluative judgment by the actor. The mere fact of such a standard does not in itself invalidate the statute.[5] The test is whether fair warning of the peril is given. [*Roth v. United States,* 354 U.S. 476, 491-492.] The statute here involved, it is surely arguable,

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[5]For example, standards of that sort have been held not void for vagueness in: *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 108-111 (contracts "reasonably calculated" or which "tend" to fix prices); *Omaechevarria v. Idaho,* 246 U.S. 343, 348 (cattle range "previously . . . or . . . usually occupied by any cattle grower"); *United States v. Alford,* 274 U.S. 264 (building a fire "near any forest, timber or other inflammable material" . . .); *United States v. Wurzbach,* 280 U.S. 396, 399 (solicit or receive "contribution for any political purpose").

gives that warning, for it tells one who performs an abortion for a purpose other than to save mother's life that he is in peril of the law.

Second: As interpreted by the California courts, to convict one of the offense defined in the California statute, it is required that the State prove that the abortion was not necessary to preserve the mother's life. [*People v. Gallardo,* 41 Cal. 2d 57, 62, 257 P.2d 29, 32]; and that the abortion was done with the "intent to commit a criminal abortion, that is, an abortion for a purpose other than to preserve the life of the mother . . ." [*People v. Ballard,* 167 Cal.App.2d 803, 817, 335 P.2d 204, 213; *People v. Arbanel,* 239 Cal.App.2d 31, 34-35, 48 Cal.Rptr. 336, 338-339.] That makes the statute sufficiently certain for constitutional purposes; for it introduces into it a definite and ascertainable element of fact, *i.e.,* intent. The fact of his intent is surely one known to the actor, indeed better known to him than to anyone else. "The state of a man's mind is as much a fact as the state of his digestion . . ." [Bowen, L.J., in *Edgington v. Fitzmaurice,* 29 Ch. D. 459, 483.] The requirement that this fact be proved makes the statute, in at least two ways, constitutionally certain.

In the first place, this Court has fully recognized that "no more than a reasonable degree of certainty can be demanded . . .," and that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." [*Boyce Motor Lines v. United States,* 342 U.S. 337, 340.] And so, it is settled beyond reasonable cavil that a statute is not "void-for-vagueness" because of a generalized delineation of conduct, if that conduct is penalized only when engaged in with

a prescribed intent. [*Screws v. United States,* 325 U.S. 91, 101-105, and the many cases there cited; *Adderly v. Florida,* 385 U.S. 39, 42.] One who, having formed that intent, engages in the kind of conduct in question, has been warned by the statute that he is perilously close to the verge of criminality. The Constitution, as this Court has many times held, requires no more than that. The statute here in issue provides no less, for, unless one who performs an abortion does so for a purpose other than to preserve the mother's life—and the actor knows with certainty what his purpose is—he is in no danger from the statute.[6] [*Ginsberg v. New York,* 390 U.S. 629, 645. *Cf., United States v. Harriss,* 347 U.S. 612, 623-624; *United States v. Ragen,* 314 U.S. 513, 523-524.]

In the second place, the requirement of a specific intent makes the verdict depend—not on the jury's agreement with the defendant's estimate of the degree of necessity—but upon the fact of his state of mind. If he proves a non-criminal state of mind, *i.e.,* the presence of an intent or purpose to save life, he must be acquitted of the charge. Of course, it is no objection to a criminal statute that, after proof of a prima facie case under it and a fair opportunity to the defendant to meet that case by proof, the jury may not credit the defendant's proof.

Third: In arriving at its conclusion that the statute was unconstitutionally vague, the court below rejected an interpretation that, it was argued, would have saved it from that defect. The suggested interpretation was that the statute required the "certainty or immediacy

[6]His danger, if any, is created by the fallibility of human beings and the institutions they man, with the consequent risk in *every* litigation that the trier of fact may err.

of death" as justifying an abortion.[7] That interpretation, the court below felt, "would work an invalid abridgement of the woman's . . . rights to life and to choose whether to bear children . . ." [*Petition,* Appendix "A," p. 10.] Obviously, the lower court was here saying something less than that it was the mother's absolute right, at any time, and for any or no reason, to terminate her pregnancy or cause it to be terminated. What is was saying was that it would be an abridgement of her right to life to deny her, by law, the benefit of a life-saving medical procedure of which she was in need. But, the statute makes no such denial. To the contrary, it expressly permits the procedure when needed for the purpose of saving her life. In that express permission there is no abridgement whatever. The court below, however, was fearful that the risk to the doctor engendered by the statute's supposed vagueness would deter him from performing even a needed abortion. [*Petition,* Appendix "A," pp. 23-24.] Thus, we see that the court's reference to the mother's right is merely a phase of the court's determination that the statute was unconstitutionally vague, and needs no discussion in its own right and separate from the vagueness issue.[8]

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[7]In the opinion as printed in the appendix to the petition, the quoted phrase is rendered as "certainty *of* immediacy." We have quoted it correctly in the text above. [See, 71 A.C. at 1004, 1005, 80 Cal. Rptr. at 358, 359.]

[8]The interest of the State in preserving the life that is certainly to be is no less or different from its interest in preserving the life that is already here. One, as much as the other, is an expression of a regard for the continuity and future of the nation. No one, we suppose, would deny the power and interest of the State to conserve for future generations its resources and natural beauties, even though that conservation involved some restriction on present rights, as for example, the right to bring up and use

(This footnote is continued on the next page)

III.

The Coincidence Between a Statute for Which There Is a Temporal Basis and the Teaching of Some Religious Sect Is Not an Establishment of Religion.

This case was decided as one under the Due Process Clause of the Fourteenth Amendment. The First Amendment, prohibiting establishment of a religion, is a part of the Fourteenth. [*School District of Abington v. Schempp*, 374 U.S. 203, 215-216.] Inherent in the attack upon the statute on due process grounds, therefore, is the contention (which was made below, at least by some of the *amici curiae*) that an anti-abortion statute amounts to an unconstitutional establishment of religion. That contention was based on the fact that

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the oil under one's land or the right to cut down a giant redwood on it. The interest to conserve those future generations, for whom such material conservation is designed, is no less compelling.

The question whether there is an adequate interest to justify such limitation of present rights as is represented by the anti-abortion statute, is itself a substantial one. After all, no right is absolute—not even the right to life, as is attested by the law's recognition of death as a lawful penalty for some crimes, and of killing in self-defense as justifiable homicide. Not even "the family itself . . . nor rights of parenthood" are beyond regulation in the public interest. [*Prince v. Massachusetts*, 321 U.S. 158, 166.] "No well-ordered society can leave to the individuals an absolute right to make final decisions unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far . . ." [Black & Douglas, JJ, concurring in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 643.]

In *Reynolds v. United States*, 98 U.S. 145, 164 [see, also, *Cleveland v. United States*, *supra*, 329 U.S. at 18-19], a statute outlawing polygamy was upheld, notwithstanding the practice was a tenet of the Mormon religion. The statute was upheld largely because the proscribed practice had always been considered an odious one and an offense against society. The practice of abortion is similarly viewed, as shown by the unanimity of legislative opinion against it. That view is at least widespread and substantial enough to justify legislation based on it.

teachings of many religious denominations on the subject, especially those of the Roman Catholic Church, are opposed, on moral grounds, to voluntary abortion.[9] Because of this coincidental similarity of those teachings with the effect of the statute, there is an air of plausibility about the contention. But it cannot withstand a moment's analysis. Churches concern themselves to a marked degree with temporal conduct, seeking to guide it along lines believed to be moral and beneficent. Much of our law is also a guide, even a command, to conduct deemed beneficial to society. If coincidence of purport between the law and religious teaching in these respects were held to be an establishment of religion, a great deal of the law as we know it would be cut down; so much of it, for only one example, as happens to coincide with the Decalogue and its proscription of murder, perjury, adultery and theft. [See, *McGowan v. Maryland*, 366 U.S. 420, 422.]

The question in any case is not whether a law is the same as the teaching of some religious sect, but whether

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[9]The latest expression of the official position of the Roman Catholic Church appears in the Encyclical Letter of Pope Paul VI, July 25, 1968:

> "In conformity with these landmarks in the human and Christian vision of marriage, we must once again declare that the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as licit means of regulating birth."

There is nothing that could properly be called the "official" position of the Protestant or Jewish religions. Views have been expressed by, for instance, the National Council of Churches of Christ, the Chief Rabbi of England, and others in clerical position that indicate no hard and fast policy. On the whole, the position expressed is not one in favor of unregulated voluntary abortion, but in favor only of an exception when necessary to save life or for other weighty therapeutic reasons. [See, Pilpel and Norwick, *When Should Abortion Be Legal* (The Public Affairs Committee, 1969) pp. 6-8.]

there is a temporal basis and justification for the law. [*McGowan v. Maryland, supra*, 366 U.S. at 433-443, and cases there cited; *School District of Abington v. Schempp, supra*, 374 U.S. at 222. *Cf., Everson v. Board of Education*, 330 U.S. 1, 16-18.]

Conclusion.

The petition for a writ of certiorari to the Supreme Court of the State of California should be granted.

Respectfully submitted,

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APPENDIX I.

State and Territorial Abortion Statutes.

ALABAMA: ". . . unless the same is necessary to preserve her life or health . . ." [*Code of Ala. Laws* (Recomp. 1958), title 14, c. 2, §9.]

ALASKA: ". . . unless the action is necessary to preserve the life of the mother . . ." [*Alaska Statutes* (1962), §11.15.060.]

ARIZONA: ". . . unless it is necessary to save her life . . ." [*Ariz. Rev. Stats.*, §13-211.]

ARKANSAS: ". . . shall not apply to any abortion produced by any regular practicing physician for the purpose of saving the mother's life . . ." [*Ark. Stats.*, 1947, §41-301.]

CALIFORNIA: ". . . unless the same is necessary to preserve her life . . ." [*Cal. Penal Code* (1872), §274, amended Cal. Stats., 1935, c. 528, p. 1605, §1.]

CANAL ZONE: ". . . unless the miscarriage is necessary to preserve the life of the woman . . ." [*Canal Zone Code* (1963) title 6, §171.]

COLORADO: ". . . upon written certification by all of the members of a special hospital board that: [c]ontinuation of the pregnancy, in their opinion, is likely to result in: The death of the women [*sic*]; or the serious impairment of the physical health . . . or the serious, permanent impairment of the mental health of the woman . . ." [*Colo. Rev. Stats., Ann.*, §40-2-50.]

CONNECTICUT: ". . . unless the same is necessary to preserve her life . . ." [*Gen. Stats. of Conn.* (Rev. 1958), §53-29.]

DELAWARE: ". . . unless the same is necessary to preserve her life . . ." [*Del. Code Ann.*, §301.]

DISTRICT OF COLUMBIA: ". . . unless the same were done as necessary for the preservation of the mother's life or health . . ." [*D.C. Code Encyc.*, §22-201.]

FLORIDA: ". . . unless the same shall have been necessary to preserve the life of such mother . . ." [*Fla. Stats.*, 1967, §782.10.]

GEORGIA: Absolute prohibition, except "an abortion performed by a physician . . . upon his best clinical judgment that an abortion is necessary because . . . continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health . . ." [*Ga. Crim. Code*, §§26-9920a, 26-9925a.]

GUAM: ". . . unless the same is necessary to preserve her life or health . . ." [Civil and Penal Code of Guam (1962 Supp.). title IX, §274.]

HAWAII: "lawfully justified" if ". . . used for purpose of saving life . . ." [*Hawaii Rev. Stats.*, §768-7.]

IDAHO: ". . . unless the same is necessary to preserve her life . . ." [*Idaho Code*, §18-601.]

ILLINOIS: ". . . necessary for the preservation of the woman's life . . ." [*Smith Hurd Ann. Stats. Ill.*, §23-1.]

INDIANA: "unless such miscarriage is necessary to preserve her life . . ." [*Burns Ind. Stats.*, Crim. Code (1956 Replace.), §10-105.]

IOWA: ". . . unless such miscarriage is necessary to preserve her life . . ." [*Iowa Code Ann.*, §701.1.]

KANSAS: ". . . unless the same is necessary to preserve her life . . ." [*Kans. Stats. Ann.*, §21-410.]

KENTUCKY: ". . . unless the miscarriage is necessary to preserve her life . . ." [*Ky. Rev. Stats.*, §436.020.]

LOUISIANA: Absolute prohibition [*West's Louisiana Rev. Stats.*, §14.87]; but denial, suspension or revocation of doctor's license "unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician . . ." [*Op. cit.*, §37:1285(6).]

MAINE: ". . . unless the same was done as necessary for the preservation of the mother's life . . ." [*Maine Rev. Stats.*, title 17, §51.]

MARYLAND: No statute. A former statute [*Annotated Laws of Maryland*, 1957, §3] was repealed in 1968. [*Maryland Acts*, 1968, c. 470, §1.]

MASSACHUSETTS: Absolute prohibition. [*Annotated Laws of Mass.*, c. 272, §19.]

MICHIGAN: ". . . unless the same shall have been necessary to preserve her life . . ." [*Mich. Comp. Laws*, §750.14.]

MINNESOTA: ". . . unless the same is necessary to preserve her life . . ." [*Minn. Stats. Ann.*, §617.18.]

MISSISSIPPI: except "where necessary for the preservation of the mother's life . . ." [*Miss. Code, 1942, Ann.*, §2223.]

MISSOURI: ". . . unless the same is necessary to preserve her life . . ." [*Vernon's Ann. Mo. Stats.*, §559.100.]

MONTANA: ". . . unless the same is necessary to preserve her life . . ." [*Mont. Rev. Codes,* §94-401.]

NEBRASKA: ". . . unless the same shall have been necessary to preserve the life of the mother . . ." [*Neb. Rev. Stats.,* 1964, §§28-404, 28-405.]

NEVADA: ". . . unless the same is necessary to preserve her life . . ." [*Nev. Rev. Stats.,* §201.120.]

NEW HAMPSHIRE: ". . . unless by reason of some malformation or of difficult or protracted labor, it shall have been necessary to preserve the life of the woman . . ." [*N.H. Rev. Stats. Ann.,* 1955, §585.13.]

NEW JERSEY: Absolute prohibition. [*N.J. Stats. Ann.,* §2A:87-1.]

NEW MEXICO: ". . . likely to result in the death of the woman or the grave impairment of the physical or mental health of the woman . . ." [*N. Mex. Stats.,* 1953, §40A-5-3.]

NEW YORK: ". . . acting under a reasonable belief that such is necessary to preserve the life of such female . . ." [*McKinney's Consol. Laws of N.Y.,* §125.05.]

NORTH CAROLINA: ". . . can reasonably establish . . . is substantial risk that continuance of pregnancy would threaten the life or gravely impair the health of the said woman." [*N.C. Gen. Stats.* (Recomp. 1953), §14-45.1.]

NORTH DAKOTA: ". . . unless the same is necessary to preserve her life . . ." [*N.D. Century Code,* §12-25-01.]

OHIO: ". . . unless such miscarriage is necessary to preserve her life . . ." [*Page's Ohio Rev. Code Ann.,* §2901.16.]

OKLAHOMA: ". . . unless the same is necessary to preserve her life . . ." [*Okla. Stats. Ann.*, §861.]

OREGON: ". . . unless the same is necessary to preserve the life of such mother . . ." [*Ore. Rev. Stats.*, §163.060.]

PENNSYLVANIA: Absolute prohibition. [*Purdon's Pa. Stats. Ann.*, §4718.]

PUERTO RICO: ". . . unless the same is necessary to preserve her life . . ." [*Laws of Puerto Rico Ann.*, title 33, §1053.]

RHODE ISLAND: ". . . unless the same is necessary to preserve her life . . ." [*Gen. Laws of R.I.*, 1956, §11-3-1.]

SAMOA: ". . . unless the same shall be necessary to prevent permanent injury to or the death of such woman . . ." [*Code of American Samoa* (1964 Supp.), §4.0402.]

SOUTH CAROLINA: ". . . unless the same shall have been necessary to preserve her life or the life of such child . . ." [*S. C. Code of Laws* (1962), §16-82.]

SOUTH DAKOTA: ". . . unless the same is necessary to preserve her life . . ." [*S.D. Comp. Laws* (1967), §22-17-1.]

TENNESSEE: ". . . unless the same shall have been done with a view to preserve the life of the mother . . ." [*Tenn. Code, Ann.* (1955), §39-301.]

TEXAS: Absolute prohibition [*Vernon's Tex. Stats.*, 1948, art. 1191] unless "procured . . . by medical advice for the purpose of saving the life of the mother." [*Op. cit.*, art. 1196.]

UTAH: ". . . unless the same is necessary to preserve her life . . ." [*Utah Code,* 1953, §76-2-1.]

VERMONT: ". . . unless the same is necessary to preserve her life . . ." [*Vt. Stats. Ann.,* title 13, c. 3, §101.]

VIRGINIA: ". . . done in good faith, with the intention of saving the life of such woman . . ." [*Code of Virginia,* §18.1-62.]

VIRGIN ISLANDS: ". . . unless necessary to preserve her life . . ." [*Virgin Islands Code Ann.* (1964), title 14, §151.]

WASHINGTON: ". . . unless the same is necessary to preserve her life . . ." [*Wash. Rev. Code* (1952), §9.02.010.]

WEST VIRGINIA: ". . . act is done in good faith, with the intention of saving the life of such woman or child." [*W. Va. Code,* §61-2-8.]

WISCONSIN: ". . . therapeutic abortion . . . necessary, to save the life of the mother . . ." [*Wisc. Stats.,* 1967, §940.04.]

WYOMING: ". . . unless such miscarriage is necessary to preserve her life . . ." [*Wyo. Stats.,* 1957, §6-77.]

APPENDIX II.

Names of Amici Curiae.

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